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INTERNATIONAL LAW

AT THE CROSSROADS

By

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INTERNATIONAL LAW AT THE CROSSROADS

by

Sompong Sucharitkul, D.C.L. (Oxon)

The President of Golden Gate University

The Dean of Golden Gate University School of Law

Distinguished Members of the American Society of International Law

And the American Society of Comparative Law

Illustrious Visiting Fulbright Scholars in Residence

Ladies and Gentlemen of International and Comparative Law

I. GENERAL INTRODUCTION

(1) Preliminary Cautions

Appropriately enough, the current session is entitled “International Law at the Crossroads”. As States are governed by international law, without exception, every precaution should be taken before the next move is to be made for the law to go ahead or forward at this juncture after having carefully looked to the left and to the right. The law could indeed be moving straight forward, continuing on the same path at the same pace it has been taking. Alternatively, it could take a turn, and there are more than one turning, to the left or to the right. Finally, international law could reverse its course, having ventured too far in the direction in which there appears to be poor lighting. The path appears dimmer at the intersection and yonder. Upon entering the crossroads and before crossing the road, one should be ever so careful. This is a time to ponder and a brief moment to pause and reflect on the recent past to be better prepared for the inevitable encounter at this significant and delicate junction ahead.

Warnings have been given of shifting norms in international law. More important still is its intertemporal character which permits international law to carry on with its evolution and the progressive development of its rules in various areas affecting our daily lives

It has become an established practice of Golden Gate University School of Law to host the Regional Conference of the American Society of International Law and to combine this auspicious event with the convocation of the Annual Fulbright Symposium. For Golden Gate University and for myself personally as Director of the Conference, it gives me immeasurable pleasure to reiterate the welcome and greetings of the President of Golden Gate University and the message from the Dean of the Law School to all participants. This Annual Conference marks the beginning of the second cycle of twelve years for members of the American Society of International Law in the West, Northwest, Southwest and Midwestern Regions of the United States to gather together their thoughts on the current progressive development of international law on selected topics of mutual concern to all peoples and nations alike, especially those inhabiting the broader Asian Pacific Region of the world.

From the very outset, the American Society of Comparative Law has found it natural and appropriate to join force with its sister society as it is plainly transparent that the search for rules of customary international law and even conventional rules of the law of nations could only proceed in part with the use of techniques mastered by comparativists in the collection, collation, comparison and compilation of the emerging rules of international law, borne out by the general and consistent practice of States.

Organizers of the Regional Conference have consistently been successful and outstanding in their ability to find a fitting, if not always perfect match from available Fulbright Scholars in Residence in the United States, at the material time, to participate more meaningfully in the Symposium, covering topics of current practical interests for publicists, comparativists, privatists and international business lawyers from around the globe.

(2) Acknowledgements

In this connection, I would like to place on record with sincere appreciation the substantial contribution for the past eight or nine years made by two Co-Directors of GGU Center for Advanced International Legal Studies, Professor Jon Sylvester, Associate Dean Emeritus of GGU, and Professor Dr. Christian Okeke, Dean Emeritus from Nigeria. It goes without saying that the achievements and successes of any international program would have been inconceivable without the untiring dedication of student assistants and staff members like Christopher Jones, who together as a team and in spite of all odds have generally managed to be prepared for every possible contingency.

The list of thanks to be expressed is endless. Yet I should not omit to mention the initial and continuing counsel and support from Founding Members of the group of internationalists who invited me from Leiden to San Francisco: First of all the triumvirate composed of former Associate Dean Marc Stickgold, Professor Joel Marsh and Professor Barton Selden. Of course there would have been no such international program today without Dean Tony Pagano and Dean Peter Keane.

It is the hope and expectation of each and every participant in the program that the Wild West will continue to benefit from the wise guidance and generous blessings of Dean Frederic White, whose message we deeply appreciate.

Last but not least, I am indebted to all Faculty Members especially Professor Larry Jones who had been at GGU years before I, and for whose unfailing support I reaffirm my deepest gratitude.

**(3) Caveats : Fundamental Differences in Conceptual Appreciation
of International Norms**

(a) International law is legally binding on every State without exception

An accurate understanding of the basic concept of international law is invariably wanting in this great country for reasons that are not always self-explanatory. Many leaders in the United States do not regard international law as law, except to the extent that it is incorporated as part of US Federal Common Law or otherwise embodied in a Treaty, ratified by a two-third majority of the US Senate. Other than that, international law seems to be legally binding exclusively on other nations, and never, not ever, on the United States : hence a convenient excuse for non-compliance because it is neither law that is sacrosanct, nor an order that is accompanied by any sanction to induce compliance.

In any event, it is as arbitrary as any rule of law that is understood, interpreted and applied in the domestic legal order of the United States, where law is, in reality, but the reflection of the opinions of the Supreme Court of the United States, an instance which is truly supreme and final in every respect, without executive or congressional oversight save by way of subsequent legislative intervention, as distinct from the process of judicial revision or review.

Instead of accepting the existence of international law which is applicable today as European in origin, and therefore Roman in character, its origin has been ignored and its character is generally misconceived, or to state it differently, international law is mainly civil law as opposed to common law, be it US Federal Common Law or English Common Law, complete with the doctrine of precedent and *stare decisis*, therefore, it is much

misunderstood. The rules of international law are in a constant process of evolution and cannot as such be frozen by any rigid doctrine of precedent, hence the significance of separate opinions and dissenting opinions in international instances, which often signal the imprecise but intertemporal character of certain detailed rules of international law in the making.

(b) International law is not necessarily identifiable with United States Law
or any other national legal order

Another facile but not uncommon mistake shared by practitioners is the misuse of the expression 'International Law' to mean simply the international application of the internal law of the United States, including its complex conflict rules. Thus, an American attorney, practicing in an American international law firm outside the United States, appears to be satisfied in this fashion with the belief that he or she is in fact practicing 'International Law', whereas all the US attorney does merely involves the interpretation and application of rules of US internal law to a fact pattern involving a foreign, i.e., non-US element. It is not unnatural for the Court of California, for instance, in case of failure on the part of a party alleging the existence or applicability of a foreign law to provide a clear and convincing proof of the rule of that foreign law, to apply Californian law on the assumption that foreign law does not differ from Californian law.

(c) The role played by the United States in the making of rules
of contemporary international law

Communis error facit jus, so it is often said. But mistakes common only among US attorneys are not common errors of universal application. They do not create law for the outside world. The very purpose of the Conference Golden Gate University School of Law is holding today, as it has done for the past thirteen or fourteen years, is to prove to American attorneys the actual existence and living realities of the outside legal world beyond and besides that obtaining in the United States and to explode the all too facile belief that globalization simply implies the universal application of US internal law. Nothing can be further from the truth. Let us wake up from our dreamland and endeavor to catch up with the rest of the real world, which since the advent of the United Nations and the International Law Commission has been actively engaged in the codification and progressive development of international law.

While the United States alone, in isolation and single-handed cannot create rules of international law, only together with the rest of the world could the United States play its rightful part, a leading role in the formation and development of rules of international law.

- (d) The extra-territorial or non-territorial application of US internal law to a dispute or conflict involving a foreign element

Last but not least by way of additional caveat is the so-called extra-territorial application of US legislation to a situation occurring outside the confines of United States territorial limits. Under the contemporary law of nations, the legal bases for a State to exercise its jurisdiction or sovereign authority are not exclusively founded on the territorial principles. They may depend upon the principles of nationality or personality, both active and passive, or on any other generally recognized legal basis, such as the protective principle, and the principles of universality and of consent.

What seems misleading in the extreme is the use or mis-application of the term 'extra-territorial' application of national or internal law of a State, be it the United States or any other national legal system for that matter. The fact that a national court of a State, say the United States, purports to exercise jurisdiction and to extend the application of its substantive national law within the territories of another equally sovereign State has been euphemistically portrayed as a pretense to apply US national law extra-territorially. The truth is fundamentally much less forgivable. In point of fact, the purported application of US national law in such an extra-territorial manner is far more objectionable because it would actually be intra-territorial or within the exclusive territorial sovereign authority of another equally independent sovereign State.

Such an exercise of intra-territorial, as opposed to simply extra-territorial, adjudicative jurisdiction is an affront to the territorial principles which the territorial State is fully entitled to resent and to reject as an insult to its sovereign dignity and equality. A *fortiorissime*, an attempt on the part of a United States agency to exercise its alleged executive or enforcement jurisdiction within the territorial confines of another friendly neighboring sovereign State is by far the most appalling practice as is clearly illustrated in the notorious case involving the forcible abduction against the law of nations of Dr. Alvarez Marchain from within the Mexican borders.

For all that, there is much room for the United States to exercise its extra-territorial jurisdiction where there is no overlap with another jurisdiction, national or international. In fact, the United States may even exercise its extra-terrestrial jurisdiction to its space craft in flight without any objection based on territorial or terrestrial ground. If United States national law is beneficial and benevolent, its extraterritorial application should not adversely affect the interest of anyone.

II. THE THEME OF THE CONFERENCE

This Conference is designed to cover a great many interesting areas of international law, notably the maintenance of international peace and security, including a revisit of the traditional concept of self-defense, an evolutionary notion of 'international terrorism' with

legal implications affecting State responsibility and international liability. The topics under survey in this report inevitably embrace recent developments of available methods of dispute settlement in the current practice of States and international organizations and the emerging trends in the *corpus juris gentium* on the regulation of international trade, in particular the protection of foreign direct investments and the international protection of intellectual property rights, and the cultural heritage of mankind, undiscovered or under waters.

A. MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

The events of September 11, 2001, have sparked new flares that rekindle the flames of an unusual style of international hostilities, posing a serious challenge to the international community in its obligation to maintain international peace and security at a cost never before imaginable.

The United States of America was bearing the brunt of frontal attacks by 'international terrorism' at a time when it was caught off-guarded. In response to this type of systematic armed attacks, The United States took defensive and protective measures in the form of the Patriot Act 2001, followed by the creation of the Home-Land Security Agency to preempt the repetition of such insidious and heinous attacks, which to all intent and purpose have been, at least from the United States perspective, completely unprovoked.

Amidst this panic-stricken multitude and the clashes of arms, certain confusion is bound to arise, adding further complications and complexities to the already tense situation. There was a clear and present danger, pointing to the need to redefine the concept of 'self-defense,' at least in regard to the scope of actions in response to the armed attacks, which would remain legitimate, proportional and as such strictly legal in the eyes of international law.

The United States has succeeded in rallying friends and allies around the world, in ASEAN, in NATO and in the United Nations to adopt a common stand against 'international terrorism.' The use of force against the Al Qaida and the Taliban Government of Afghanistan was inevitable and the ensuing campaign was a major success in almost every sense of the term.

The only problem that the United States has to face is to distinguish itself from the group of perpetrators of 'international terrorism' by avoiding the path of 'international terrorism.' As itself a victim, The United States, having been victorious and triumphant against the terrorists and the Taliban, should not ultimately succumb to the level of 'international terrorists,' by itself denying due process of law and abandoning respect for the dignity of the human persons. After all, the Al Qaida members are human, and should be treated as such by any standard of international law, even at its most primitive stage.

The recent decision of the United States of Appeals for the Ninth Circuit in Gherebi v. Bush and Rumsfeld (No. 03-55785, District Court No. V-03-01267 – AHM) is encouraging. It concluded that the United States exercises sole jurisdiction and all the attributes of full territorial sovereignty over the Guantanamo Bay Naval Base in Cuba, while Cuba retains only a residual or reversionary sovereignty interest (to borrow a common law term in real property) and remanded the case to the United States District Court of the Central District of California.

1. THE NEED TO REDEFINE SELF-DEFENSE

I crave the indulgence of participants to bear with me by remaining impartial and objective in the true sense of the word. It is difficult to create or establish any concrete edifice. On the other hand, it is much easier to destroy what has been painstakingly built for the sake of sheer destruction.

International peace and security is wholesome but delicate and fragile if not indeed outright vulnerable. It is one and indivisible. Once assured, secured and maintained, it should be sustained at any cost, but not at the cost of self-degradation or self-serving safety and false security.

The problems facing all of us are multi-faceted and global. They deserve our undeviating attention, our closest study and deepest appreciation, which could only be assured with the exercise of utmost care, free of arbitrary discrimination and unrestrained emotions. It is indeed insuperable to deal with these complex problems without investigating all the relevant material facts, or absent a thorough understanding of rules of international law on the matter under review.

Admittedly, the United States is the victim State under international terrorist attack. For this very reason, the United States itself cannot serve as a *judex in sua causa*. A balanced opinion of a neutral third party is more likely to guarantee that the use of force in self-defense and in defense of freedom is supported, authorized and justified by principles of justice and international law, and not otherwise inconsistent with the Rule of Law under the law of nations.

For present purposes, an *amicus* brief should be submitted not by an American attorney nor by any representative of the United States Government, but by a friend of the United States whose vision is not beclouded by patriotic self-interest, but whose position remains in close contact with the continuing progressive development of international law, without being out of touch with the current legal thinking of the United States Government.

An examination of the concept of self-defense under international law as it is understood, interpreted and applied by the International Court of Justice, is worth pursuing

with intensive care at this juncture. At the same time, the official positions taken by the United States Government in various instances, reflecting the genuine and honest but erroneous belief on the part of the United States Government relating to the basic notion of self-defense and its ramifications also deserve even greater attention.

Time and again, the official and informal or unofficial positions taken by the United States administration or legal advisors appear to have been singularly if not uniquely American in out-look. To give but a few pertinent examples, a couple of judicial decisions of the highest international legal order, the International Court of Justice, may help illustrate the extent of misapprehension or unfounded blunders on the part of the United States Government, as shown in the case of military and para-military activities in and against Nicaragua, Nicaragua v. U.S.A., 1986 (ICJ Report 1986), and in the case of the Oil Platforms in the Persian Gulf, Iran v. U.S.A., 2003 (ICJ Report 2003). These two decisions may serve to bring home to many open-minded United States attorneys the danger and disastrous consequences of United States misconception of so fundamental a notion as that of self-defense in international law.

In the Nicaragua Case, in which the United States staged its historic walk-out of the Court Proceedings and left the hearings on the merits unattended without providing the Court with the benefit of its presentation *in facie curiae*, thereby leaving the Court with no choice but *sua sponte* to conduct its own independent investigation of the facts as alleged by Nicaragua in the absence of contrary contentions by the United States. As it happened, as a matter of fact, the Court upheld United States reservation to its declaration accepting compulsory jurisdiction by refusing to subject to the jurisdiction of the Court disputes involving the interpretation and application of provisions of multilateral conventions, such as the Charter of the United Nations and the Charter of the Organizations of the American States without the participation of other parties to the multilateral treaties. Both Nicaragua and the United States had the benefit of expert legal opinions of American attorneys, Professor Abram Chayes of Harvard, appearing on behalf of Nicaragua, and Professor Stefan Riesenfeld of Boalt and Hastings for the United States of America. The Court would have been prepared at least in part to uphold the validity of the United States contention that the use of force by the United States against Nicaragua was in the exercise of the inherent right of 'collective self-defense', had there been a slimmest evidence of the official request either from El Salvador or from Honduras for OAS assistance. Lacking this invitation which the Court regarded as indispensable to justify any resort of the use of force by the United States in the form of collective self-defense under the OAS Charter, the United States reliance on self-defense would appear totally untenable. International law does not permit unilateral or unsolicited 'collective self-defense'. This salient fact appeared unnoticed if not unknown to the United States, which unilaterally and arbitrarily resorted to the use of force against Nicaragua allegedly on the ground of self-defense, collective or individual, under Article 51 of the United Nations Charter.

The United States was not the only State that misconstrued the notion of self-defense in the last half century. The United Kingdom in the Corfu Channel Case (1949) almost four decades earlier had been reprimanded by the same International Court of

Justice for the use of force to sweep the mines in the Corfu Channel as an illegitimate act of self-help, not authorized by any rule of international law. Likewise, the joint use of force by the United Kingdom and France to protect their economic self-interest in the wake of the Egyptian nationalization of the Suez Canal in 1949 was not regarded by the United Nations Security Council as an act of legitimate self-defense. The United States appeared to have concurred in the decision of the Security Council to the effect that self-defense does not include the forcible protection of national or international economic interests or investments.

In the latest case of the Oil Platforms, Iran v. U.S.A., 2003, (ICJ Report 2003), the same International Court of Justice once again, in no uncertain terms, took occasion to adjudge and declare that the series of attacks by the United States armed forces against the various oil platforms of Iran could not in any way whatsoever be justified as an act of self-defense. However, the Court was not prepared to hold either Party, Iran or the United States, responsible for compensation for breach of the bilateral Treaty of Economic Cooperation and Consular Relations of 1955, neither commerce nor freedom of navigation between the two Parties was impaired or adversely affected by the United States attacks, nor in the counter-claim by the mining of a United States reflagged vessel without a clear and convincing evidence of attribution of the mine that actually exploded and damaged the United States flag.

Whatever the generally accepted definition of self-defense under contemporary international law, Article 51 of the Charter provides a significant clue.

“Nothing in the present Charter shall impair the inherent right of self-defense, individual or collective, if an armed attack occurs”

The only measure that could trigger resort to the use of force as an exercise of the inherent right of self-defense is the occurrence of an armed attack. An imminent threat of an armed attack does not afford any justification for the use of force in self-defense, except insofar as it could be construed as ‘anticipatory self-defense’ or ‘preemptive strike’, having regard to the circumstances and placing the risk of misjudgment squarely on the party that was the first to strike. Under the traditional United States theory, dating back to The Caroline (1837) to which the United Kingdom eventually subscribed,

“The necessity of self-defense must be instant and overwhelming, leaving no choice of means and no moment for deliberation”

The use of force in case of necessity to ward off imminent and overwhelming threat of attack is otherwise also subject to further qualifications and limitations as to time, place, methodology and proportionality. In other words, any State deciding to resort to the use of force allegedly in self-defense would have to provide evidence of the occurrence of an armed attack against its territorial integrity or political independence.

For anticipatory self-defense or preemptive strike, the State using armed forces in self-defense must bear the risk of its own misapprehension, miscalculation or misconstruction, such as the case of the U.S.S. Vincennes downing Iran Airbus IR655 in 1988 or the Russian Command Base ordering the shooting of Korean Airlines KAL007 in 1983. It is now generally agreed in principle that in no circumstances can a civil or commercial aircraft in flight be attacked or otherwise shot down unless that aircraft had been converted by terrorists into a weapon of mass destruction, in which event that aircraft in flight had ceased to retain its protected status and forfeited its privilege by becoming in living reality a weapon of mass destruction. In this connection, the United States may be said to have contributed to the delay in the general acceptance of conditions for safety and security of civil aircraft with passengers in flight and to have established an instant custom in international air law supporting preemptive strike or anticipatory self-defense in line with The Caroline principles. The Bush doctrine was clearly preceded by the occurrence of armed attacks, so determined by the Security Council the very next day. However, the application of the doctrine of anticipatory self-defense to destroy an aircraft in flight, which has never been ordered, would have to satisfy very stricter tests than suggested in The Caroline Incident.

It should be further observed that the expression 'necessity of self-defense' as coined by Secretary Webster a century and a half ago may also refer to the concept of 'state of necessity' side by side with that of 'self-defense' as two distinct sets of circumstances precluding wrongfulness in the contemporary law of State Responsibility.

However, the restrictions or qualifications set by the United States Government to limit the possible excuse of 'self-defense' advanced by the United Kingdom in The Caroline (1837) had been much misunderstood by younger generations of United States international legal scholars. The Anglo-American theory formulated since The Caroline Incident must be read in the light of the circumstances of the case, i. e., without the occurrence of an 'armed attack' as defined by Article 51 of the United Nations Charter. Thus, without prior 'armed attack' by the United States against the territory of the United Kingdom, i. e., Canada, the right of 'preemptive strike' or 'anticipatory self-defense' or indeed 'the necessity of self-defense', as claimed by the United Kingdom, would appear totally unwarranted and devoid of any logic or reason under international law.

The 'necessity of self-defense' as defined and required by the time-honored Anglo-American theory of anticipatory self-defense would be redundant if not absolutely meaningless, once an 'armed attack' actually occurred, as in the incidents of September 11, 2001 where infernal hell broke loose. There would be no further need for the United States to adduce any more evidence of a threat or use of force by the terrorists when more than one series of unceasing and continuing 'armed attacks' by the Al Qaida terrorists persisted unabated against the United States and other peace-loving nations the world over. These indiscriminate attacks by the terrorists against innocent civilians, women and children and government agencies alike were perpetrated with the view to instilling fear or to intimidating the international community into submission to the demands of the terrorists.

(2) THE NEED TO REMAIN CALM AND TO OVERCOME PANIC

A question most practically pertinent to all of us at this Conference is the necessity to remain calm and collected in the case of such national calamity as the events of September 11, 2001. It is often difficult to maintain law and order when the crowd has become panic-stricken. Some of us were almost ready to sacrifice the democratic way of life to throw away our hard-earned democratic institutions and wisdom and to turn to embrace the methodology adopted by the terrorists. 'An eye for an eye' could be the order of the day. Chaos could follow. It would be easy to turn vengeful and punitive, even by barking up usually the wrong tree. Institutions such as the United States law schools are normally endowed with reason and intelligence and should be prepared to maintain the standard of international law and justice as understood and upheld by the entire civilized world.

To one's incredulous amazement and dismay, the panic-stricken intelligentsia appears to have momentarily lost its sense of direction by conceding more credits to the already far-reaching disaster and havoc inflicted by the terrorists upon the international community, especially the United States. Far greater successes were attributed to the terrorists than the terrorists themselves would have planned or been prepared to claim.

Hostilities were displayed in academia against foreign students who in normal circumstances would have been treated already as 'delinquents' on their first physical contact with United States soil for their belated arrival through no faults of theirs. They are now more than ever being mistreated with contempt in addition to the old cold perfunctory reception. Hate-speeches were heard, confusing Islamism with terrorism. Discrimination of the ugliest kind was unleashed against academic qualifications, especially targeting non-US legal scholars on both ends of United States legal education. Much worse could have been the position of non-US law teachers. Indeed, without foreign law graduates, there would have been no studies of comparative legal system in this country. Without foreign-trained legal scholars and practitioners, much slower progress could have been made in the internationalization of United States legal education. Only the process of brain-drain has kept institutions like Harvard and Yale going unabated, thus, barely keeping pace with the rest of the legal world. This line of discrimination based on the artificiality of nationality, or its duplicity or multiplicity, or the lack thereof, would appear to run counter to any trend towards globalization.

It is easy to jump to conclusion which is invariably wrong. There are possibly extremists in most if not all religions. It would be an indelible mistake to identify the terrorists Al Qaida or any such group with the Islamic faith. Little do we realize that consistent with the broader outlook of the notion of cultural heritage and civilization, there are surprisingly many more Islamic members of the International Court of Justice than any other single faith, Bhuddhist, Christian, Hindu, Judaist or others.

(3) THE EVOLUTIONARY NOTION OF 'INTERNATIONAL TERRORISM'

'Terrorism' has left its mark throughout history, from 'Ivan the Terrible' to the 'Reign of Terror' of the French Revolution and from the relatively more modern definition of 'international terrorism' under the Geneva Convention of 1937, following assassinations of Statesmen and leaders of Europe, and the 'terrors in the skies' in the 70s and 80s. From the outset, the element of terror has been predominant in any definition of 'international terrorism'. The object and purpose of the act of terror would appear to be associated with the series of targets of attacks by the terrorists. The immediate targets could be individuals, captured, abducted, tortured, taken hostages, and murdered or massacred. The intermediate targets could be the immediate family members of the first set of targets. Again the ultimate targets could be the public at large, or the community to be intimidated into fear. The motivation could have been, as in the case of seizure of aircraft in flight or sabotage to secure certain concessions or advantages through the pressure of fear and intimidation. The series of international conventions, such as the Tokyo Convention 1963, The Hague Convention 1970 and the Montreal Convention 1971 contain provisions defining 'acts of terrorism' for purposes of the particular treaties, such as unlawful seizure of aircraft in flight, sabotage of aircraft, attacks at airport and offenses committed on board an aircraft.

Similar types of offenses were conceivable in regard to sea-jacking of vessels such as The Achille Lauro other than piracy *ex jure gentium* or car-jacking and train-jacking. These acts of terrorism appear to have been committed by an organized group or groups such as liberation movements or national liberation fronts, but occasionally include State sponsored acts of terrorism for whatever motivation or purpose such as collection of ransoms, liberation or release or exchange of detainees or prisoners.

Today, however, 'terrorism' has assumed a far broader dimension. It has become internationalized and the 'acts of terrorism' are more highly technically planned, comparable to 'acts of war' or 'aggression'. They are no longer for 'private gains' but more distinctly to achieve international recognition. Present-day 'international terrorists' have designs for new type of targets or victims. The United States of America is a frequent target. Countries like Saudi Arabia and Egypt have also served as targets for terrorist attacks, including their nationals and residents, almost without discrimination. The international community such as the United Nations, as an international organization, could also be targeted. So also could journalists accredited as television correspondents accompanying coalition forces in Afghanistan or in Iraq to cover the progress of the on-going international armed conflict on a world-wide network or news series. A few journalists have themselves become victims of terrorist attacks.

On the other hand, terrorist groups may also be harbored, supported, hosted or sponsored by a State, or an international organization or agency, while the planning and initiation of 'acts of international terrorism' could even entail the use of a suicide squad.

The new methodology of 'terrorist attacks' appears insidious and deadly, with little or no warning.

This changing notion of 'international terrorism' presents a challenge to international legal scholars. A new definition or redefinition of 'international terrorism' is called for. This could be a new topic for codification and progressive development of international law, taking the form of draft articles or draft convention or draft Code of Offences against the Peace and Security of Mankind.

'Acts of international terrorism' are no longer one-shot affairs or isolated incidents but comprising multiple complexities of coordinated plans of actions. The events of September 11, 2001 clearly demonstrate the existence of initial master plans to coordinate seizure of civil aircraft in flight. The primary targets of destruction were not the aircraft in flight, neither American Airlines nor United Airlines, but strategic landmarks were targeted on the ground, the Twin Towers of the World Trade Center, the Pentagon, symbol of the United States military might, and possibly also the White House, which was aborted. Secondary targets were the human victims, not only passengers on board the aircraft and the hi-jackers themselves but also businessmen, women and children at the World Trade Center and officials on mission at the Pentagon. The ultimate objects and targets of these terrorist attacks were the United States of America and its allies as well as the United Nations and the world community or humanity as a whole.

(a) Multi-dimensional expansion of the concept of 'international terrorism'

'International terrorism', as such, deserves to be defined with reference to the primary, secondary, and ultimate objectives of the attacks. It has to be redefined with a broader perspective of the ways and means, or the methodology to intimidate or to put fear into the hearts and souls of millions of peoples, regardless of their race, gender, religion, or political coloration. Furthermore, 'international terrorism' has to be identified with a group or combination of groups of fanatics, who are consumed with the fire of hatred to give up their own lives in the false belief that they would find redemption or ultimate salvation.

To be able to establish the root cause that inspires 'international terrorism', it is not possible simply to dismiss the inquiry upon the finding of insanity on the part of the fanatics. A further quare should be raised to verify the true causes of such international fanaticism.

This Conference cannot expect to resolve all the problems connected with 'international terrorism', but it is time serious consideration was given to such a study and with determination.

(b) Corresponding progressive developments in the law of State Responsibility and international liability

While the targets and victims of terrorist attacks have been thus classified into the categories of their primacy and ultimacy of objectives, the complicity among the classes of authors and perpetrators of 'acts of international terrorism' also merits our closest attention. Individuals committing an offense or taking part in its commission are identified as alleged offenders and may be punishable for the offenses committed against the law of nations. In addition, States procuring, sponsoring, training, or otherwise responsible for 'acts of international terrorism' are also accountable and liable for such acts, whether or not categorized as an offense against the peace and security of mankind. The internationally wrongful acts committed by the States engage their responsibility, in whole or in part, as principals or accessories before or after the fact. Furthermore, every State is answerable and absolutely liable for all the injurious consequences originating from its territory or under its jurisdiction or control, provided only that the resulting injury was a direct consequence emanating from its territory or from under its jurisdiction or control.

(c) Recent international jurisprudence

A case study worth noting in international practice is the explosion of Pan American flight at Lockerbie in Scotland in 1988. Two Libyan officials were delivered to the Netherlands for detention, prosecution and trial at Camp Zeist. The criminal prosecution and proceedings took place in the Netherlands before a Scottish Court sitting in the Netherlands, applying Scottish criminal law and procedures, terminating with one acquittal and one conviction.

Meanwhile, the proceeding pending before the International Court of Justice instituted by Libya against the United States of America on the one hand, and the United Kingdom on the other for alleged failure to comply with their respective obligation to request extradition of the two Libyan officials under the Montreal Convention of 1971, after prolonged deliberation in and out of Court, ended in the Security Council with the Libyan Government agreeing to pay US dollars 2.7 billion for the Lockerbie disaster (or US dollars 10 million for each of the 270 passengers that perished at Lockerbie), thereby removing the case from the roster of the international forum. Thereupon France in turn was seeking comparable compensation for the loss of a jet aircraft of the l'Union des Transports Aériens (UTA) and its 170 passengers, and another payment of US dollars 170 million was agreed as a settlement between Libya and France in addition to the US dollars 33 million awarded by the French Court.

It should be noted, in passing, that the United States and the United Kingdom, both being permanent members of the Security Council, could preempt the passage of an authorization of an installment sale of crude oil from Libya by mere exercise of the veto, while France, being equally a permanent member of the Security Council, is clearly armed with the same power to put a stop to any resolution of importance by the Security Council. Other members of the United Nations may not have been so fortunate as to possess a veto power at such critical juncture. They would have to struggle harder to turn the wheel of justice forward.

Such is a complete cycle of the Law of State Responsibility up to and including final satisfaction of the obligation to wipe out the consequences of an internationally wrongful act committed by a State as a partner or participant in the 'acts of international terrorism'. This only goes to show the utter futility and wanton waste of 'international terrorism'. It does not pay to commit an 'act of terror' in whatever form or manner. In the longer run, and in the ultimate analysis, it is the terrorists themselves that have to pay for all the injurious consequences of their internationally wrongful acts.

*'The dog it was that died!'**

* From an Eulogy on 'The Death of a Mad Dog'

II. PACIFIC SETTLEMENT OF DISPUTES BETWEEN STATES

(1) Encouraging Trends among Neighboring States seeking to Avoid

Confrontation by Adopting Pacific Means of Dispute Settlement

Having surveyed the practice of States in the areas of non-use of force and having studied some of the reasons why States have found it imperative to resort to the use of force as a measure of permissible self-defense or pursuant to an authorization by the competent organ of the United Nations, as a necessary measure to restore peace and order, it is time to move to the alternative methods of dispute settlement.

Increasingly, States have begun to demonstrate greater reliance on and more implicit faith in the available methods of dispute settlement of their choice. It is encouraging to note that in the dispute regarding sovereignty over two islands in the Celebes Sea, the Pulau Litigan and Pulau Sipadan between Malaysia and Indonesia, the Parties have agreed to abide by the decisions of the International Court of Justice before hand and did accept the quasi-unanimous decision of the Court that the two islands are under Malaysia's sovereignty (2003 ICJ Report.)

Similarly, in two further instances, Malaysia and Singapore have followed suite by requesting the International Court of Justice to decide whether sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge belongs to Malaysia or Singapore. The matter is currently *subjudice* the International Court of Justice. At the same time, Malaysia has requested provisional measures from the International Tribunal for the Law of the Sea, in another dispute with Singapore, (Case No. 12 ITLOS 20031), and by an order of 8 October 2003, the Tribunal has prescribed appropriate provisional measures pending a decision by the Annex VII Arbitral Tribunal, including the appointment by each

Party of a group of independent experts to exchange information and to assess risks or effects of Singapore's land reclamation, directing Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking into account the reports of the group of independent experts, and deciding that both Malaysia and Indonesia shall each submit an initial report by 9 January 2004 to the ITLOS and to the Annex VII Arbitral Tribunal, seised of the merits of the dispute, unless the latter decides otherwise.

In more ways than one, provisional measures in the realm of marine environment have served to operate as a brake to allow Parties time to consider the fullest effect of the impact of a particular project in conformity with the precautionary principle and the assurance of 'sustainable development', which should not result in irreparable or irreversible prejudice to adjacent or opposite States.

In an earlier case, concerning the Southern Blue-fin Tunas, provisional measures have proven beneficial and benevolent when prescribed by ITLOS, even though eventually the Annex VII Arbitral Tribunal declined jurisdiction on technical ground of insufficiency of existing data, the salutary effect on the stocks of Southern blue-fin tunas appears mutually beneficial for all concerned.

The binding character of provisional measures was no longer in dispute, not even by the United States of America in Avena and other Mexican Nationals (Mexico v. U.S.A., 2003 ICJ Report), where the Court unanimously adopted an order indicating provisional measure, requiring the United States to take all measures to ensure that "Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera of Mexican nationality are not executed pending final judgment in these proceedings." This Order has not given rise to any objection on the part of the United States as a Party to the dispute with Mexico.

(2) Better Understanding of International Law Apparent on the Part of States

It is noticeable that the increasing use of dispute settlement mechanisms of various types and purposes may be considered a reflection of a more positive attitude and posture maintained by States, notwithstanding their steadfast belief in the integrity of their sovereign authority.

Thus, in a proceeding instituted by the Republic of Congo against France (Congo v. France, 2003 ICJ Report), France has consented to the exercise of jurisdiction by the Court under Article 38, paragraph 5, of the Rules of Court. Without France's consent, the proceeding could not have been instituted.

More States are amenable to the jurisdiction of the International Court of Justice as a *Forum* of their choice, thereby the Court could become a *Forum prorogatum* with an

agreement in advance to abide by and implement the decision of the international instance, regardless of the outcome.

(3) Improvements in the Rules of International Law Inspiring Greater Confidence on the Part of States to Settle their Disputes by Peaceful Means according to International Law or the Law of the United Nations

Whatever the shifting norms of international law, they appear now more than ever reasonable and acceptable to States. To settle their disputes by one of the pacific methods of dispute settlement appears far less costly than to resort to the use of armed force against another State or to engage in hostilities against any State or non-State entity in an armed conflict, international or non-international, internal or otherwise. Utmost care must be exercised so as to maintain if not indeed to upgrade the level of justice and dependability of rules of international law applicable to a particular dispute.

(4) Enhancing the Role Played by International Organizations in the Promotion of Friendly Relations and Cooperation among States under the Charter of the United Nations

In the year or two just past, it is to be noted that the United States of America has been working more closely and exceedingly meaningfully with the United Nations, especially in the Security Council and with the Secretary-General of the United Nations. Whatever the justification for the United States and the United Kingdom forces to have led an armed invasion of Iraq and to occupy the country, the Security Council has condoned if not explicitly authorized the counter-measures led by the US/UK forces. In Resolution 1483 of 22 May 2003, the multi-national force under the unified United States command was recognized by the Security Council as the Authority, and was authorized by Resolution 1511, paragraph 13 of 16 October 2003, to remain in occupied territory of Iraq and to be accountable for the maintenance of peace and security as well as the internal law and order, and to pave the way for a complete transfer of authority of the Iraqi people to the Iraqi people and to the freely elected Government of Iraq by 30 June 2004.

(5) New Impressive Record of United States Membership in International Organizations

Clearly an international organization is only as strong and effective as its Members may wish it to be. The United Nations Organization is no exception. The recent attitude of

the United States turning its responsibility to the United Nations for peace-keeping operations in Iraq appears to be very well received by its European allies in NATO such as France and the Federal Republic of Germany.

It is excellent news that the United States has revised its image for the outside world regarding its opinion of the United Nations. Whether or not the United Nations could regain its relevancy appears to depend in large measure on the United Nations itself.

The United States is a holder of a unique record of its withdrawal from the Specialized Agencies of the United Nations, once or twice from ILO and from UNESCO. It has threatened a few times to withdraw from FAO and to treat the United Nations itself as ceasing to be relevant. Now the tide seems to have turned and the United States has safely returned to UNESCO and renewed its ties and participation within that Organization which is dedicated to education, science and culture. That is why Golden Gate University has taken advantage of that opening by accepting the invitation to serve as UNESCO expert consultant on many current projects and today an expert consultant for UNESCO in the person of Professor Doctor Guido Carlucci is a welcome expert invitee among participants of this Regional Conference and the Fulbright Symposium.

(6) An Overture from WTO

The future of global economy and economic cooperation depends to a large extent on the continuation of existing friendly relations and cooperation among States. A world organization, such as the WTO as an autonomous international entity can also cease to be relevant if it could not perform its services and functions to the international trading community as may be expected of such an organization by the world community.

In this connection, it is comforting to learn of the outcome of a recent Report of the Appellate Body of the WTO in a case concerning United States Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, (WT/DS2571/AB/R), 19 January 2004. The Report of the WTO Appellate Body is very reassuring, as it reversed the Panel's findings with respect to Article 14 (d) of the SCM Agreement and found that the United States Department of Commerce was entitled to use a benchmark other than private prices in Canada, given that the United States had established that the private prices of goods in Canada were distorted as a result of the Canadian Government's predominant role in this market. Whatever the merits of the Report of the WTO Appellate Body in the case noted, it is a welcome decision that would help sustain the relevancy of the WTO itself.

Having collaborated with the ABA in the unified efforts to persuade the United States Administration to retain membership of various Specialized Agencies of the United Nations such as UNESCO, ILO and FAO, Golden Gate University would like to express the hope that WTO will never cease to be relevant to the healthy regulation of World Trade,

and that in its wisdom, WTO should be able to convince the United States of its usefulness to World Trade as a whole. In the ultimate analysis, enlightened national leaders should see no inconsistencies between their national interests and those of the international community, or humanity as a whole.

III. CONCLUSION

The foregoing report in the form of a survey of State practice in the period of twelve months that has just ended does not lend itself to any definitive conclusion of a general character. It serves as a *tour d'horizon* of the events and developments in the preceding year.

The general introduction to this report serves as a reminder of the continuing vicissitudes in certain areas in the maintenance of international peace and security. What we have learned appear to be a valid lesson that the United States cannot afford to abandon the United Nations. Nor can any other State invade and occupy the territory of another equally sovereign and independent State.

For the invasion and occupation of Iraq by the multi-national force under a unified command, the United States and friends have succeeded in persuading Members of the Security Council, albeit *ex post facto*, to execute a subsequent ratification of their resort to the use of armed forces against the territorial integrity and political independence of Iraq as acts authorized by the Security Council under Chapter VII under paragraph 4 of Resolution 1483 of 22 May 2003 and under paragraph 13 of Resolution 1511 of 16 October 2003 “*To take all measures to contribute to the maintenance of security and stability of Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institution of the Iraqi administration, and key humanitarian and economic infrastructures.*” These are in part the essential functions and responsibilities assigned to the United States as unified commander of the multi-national force currently occupying Iraq. Other duties and responsibilities are governed by the existing customs of the Law of Armed Conflicts after cessation of hostilities and pending the establishment of the more permanent administering authority for the Iraqi people by the Iraqi people under the new Constitution to be freely adopted by universal suffrage of the Iraqi populations.

These findings point to a tentative conclusion of the termination of the State of instability in that war-torn country of Iraq, without specifying in greater detail at this stage the respective duties, responsibilities and liabilities of the unified command of the multi-national force in interim Iraq. In the mean time, the United Nations Compensation Commission through its Governing Council has already disclosed the figures of adjudged

compensation, close to US dollars 200 billion outstanding balance to be defrayed out of the Compensation Fund derived from the proceeds of the half-yearly sale of crude oil from Iraq as authorized by the Security Council. These adjudged debts are *res judicata* and would have priority over other new debts.

On a number of points of international law relating to the exception of “state of necessity” that the new Iraqi Government to be constituted after 1 July 2004, the actual implementation of the outstanding balance of overall debts incurred by the predecessor Government of Saddam Hussein would present a challenge to any legal scholar faced with the dilemma of the hierarchy or priorities of debts owed by Iraq to so many member States of the United Nations for losses incurred by their nationals and companies for the invasion and occupation of Kuwait by the armed forces of Saddam Hussein.

Having disposed of a more pressing need to bring an end to an international armed conflict, the second almost equally pressing problem is the codification of Rules of International Law to combat, suppress and punish acts of international terrorism.

These are indeed difficult tasks that lie ahead. Coming as we do to these crossroads, we need to be resolute in making up our mind without hesitancy to move in the direction that best obviate further perpetration of acts of violence associated with international terrorism, including murder, taking of hostages, genocide, torture and other offenses against the rules of the conduct of armed conflict.

Noticeable on the horizon yonder, we see every encouraging sign that enlightened States expressed their preferences for an option of a peaceful method of dispute settlement rather than resort to the use of force otherwise prohibited by Article 2, paragraph 4, of the United Nations Charter. This growing practice among neighboring States in Southeast Asia, Asia, Africa and Latin America should be further encouraged and possibly followed by Western Powers in their future treatment of their own internal struggles for the rights of the indigenous populations and other racial and ethnical minority groups. Negotiations in good faith without fear of intimidation are strongly recommended. Patience and understanding are counseled for negotiators or facilitators in their endeavor to resolve difficult internal or non-international conflicts.

Last but not least is a gentle reminder to all States not even to ever think of reversing this healthy trend, say by backing out or bailing out of the existing situation, such as by withdrawal from the existing membership of an International Organization, such as UNESCO, ILO, FAO or even WTO, to impose a serious set-back on the Organization in question. To set the clock back in time is never really successful. States are encouraged to move forward ahead and to regain their strong determination to overcome the obstacles that stand in their path.

San Francisco, 12 March 2004